

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of	)	
	)	
Disposition of Down Payments and Pending	)	WT Docket No. 02-276
Applications for Licenses Won During Auction	)	
No. 35 for Spectrum Formerly Licensed to	)	
Nextwave Personal Communications Inc.,	)	
NextWave Power Partners, Inc., and Urban	)	
Comm-North Carolina, Inc.	)	
To: The Commission		

**COMMENTS OF CINGULAR WIRELESS LLC**

Cingular Wireless LLC (“Cingular”) hereby submits these comments in response to the Commission’s *Public Notice* regarding the disposition of down payments and pending applications for licenses won during Auction 35 for spectrum previously licensed to NextWave Personal Communications Inc. and certain affiliates (collectively “NextWave”) and Urban Comm-North Carolina, Inc. (“Urban Comm”).<sup>1</sup> As shown below, the public interest would best be served if the Commission permits Auction 35 applicants to voluntarily dismiss their long-pending applications, refunds their monies on deposit with the Commission, and relieves them of their Auction 35 contingent liabilities without penalty.

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<sup>1</sup> *Public Notice*, FCC 02-248 (rel. Sept. 12, 2002) (“*Public Notice*”). Cingular is the holder of a non-controlling ownership interest in Salmon PCS, LLC, the winning bidder for a number of licenses yet to be awarded following the conclusion of Auction 35 in January 2001. These comments reflect the views solely of Cingular and focus on the need for Auction 35 relief. As a non-applicant, Cingular believes that a discussion of the various relief proposals is best addressed by the applicants themselves.

## DISCUSSION

It has been nearly two years since the conclusion of Auction 35 and applicants for the NextWave and Urban Comm spectrum have yet to receive licenses. While Auction 35 was conducted with the laudable goal of *promptly* re-licensing the NextWave/Urban-Comm spectrum and putting it to immediate use, the Commission has not been able to meet this goal. Even though oral argument at the Supreme Court has been concluded, there is no immediate prospect for award of the licenses even if the FCC prevails. Prompt action is therefore warranted because (i) the ongoing delay in awarding licenses is contrary to fundamental purposes of the auction statute, and (ii) the uncertainty created by continuing liabilities is causing needless harm to the wireless industry and the economy in general, contrary to the Commission's spectrum management policies. Given the unique circumstances associated with Auction 35, the FCC should permit Auction 35 applicants to voluntarily dismiss their long-pending applications, refund their remaining monies on deposit with the Commission, and relieve them of their Auction 35 contingent liabilities without penalty.

### **A. The Inability to Promptly Deliver the Licenses Is Contrary to the Purpose of the Auction Statute**

One of the essential policy objectives underlying Congress' authorization of auctions as a method for awarding licenses was to expedite the speed of licensing and in turn the provision of service to the public.<sup>2</sup> This was necessary given the problems associated with other methods for choosing among mutually exclusive applications, particularly comparative hearings which

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<sup>2</sup> See H. R. Rep. No. 103-111, at 253 (1993) ("The Committee finds that current licensing procedures often delay delivery of services to the public . . . ; that a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services . . . ; and that therefore, the Federal Communications Commission should have the authority to issue licenses using a system of competitive bids."), *reprinted in* 1993 U.S.C.C.A.N. 378, 580.

entailed considerable administrative and judicial delays.<sup>3</sup> Accordingly, Congress enacted Section 309(j), which states that in establishing procedures for competitive bidding, the Commission shall, *inter alia*, “seek to promote . . . the development *and rapid deployment* of new technologies, products, and services for the benefit of the public, including those residing in rural areas, *without administrative or judicial delays.*”<sup>4</sup>

In the case of the licenses the FCC made available in Auction 35, the licenses were previously held by licensees who were unable to pay the amount bid even on an installment basis, requested restructuring relief from the Commission, and eventually sought bankruptcy protection, causing their spectrum to lie idle for nearly four years. Buttressed by favorable rulings from the United States Court of Appeals for the Second Circuit<sup>5</sup> and the lengthy period of non-use, the FCC decided to re-auction the cancelled licenses to allow the spectrum to be promptly re-licensed and utilized for the benefit of the public.<sup>6</sup> The FCC acknowledged that administrative and or judicial challenges remained pending, but concluded that “[i]ncluding contested licenses in the auction helps to fulfill the Commission’s statutory mandate *to hasten*

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<sup>3</sup> See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 F.C.C.R. 2348, 2358 (1994) (“*Competitive Bidding Second Report*”).

<sup>4</sup> 47 U.S.C. § 309(j)(3)(A) (emphasis added); see *Competitive Bidding Second Report*, 9 F.C.C.R. at 2358 (noting that the competitive bidding system adopted by the Commission to award PCS licenses was intended to “speed . . . service to the public” and “avoid . . . time-consuming litigation”).

<sup>5</sup> See *In re: NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999), *cert. denied*, 531 U.S. 924 (2000); *In re: FCC*, 217 F.3d 125 (2d Cir. 2000), *cert. denied*, 531 S. Ct. 1029 (2000).

<sup>6</sup> See *NextWave Personal Communications, Inc., Order on Reconsideration*, 15 F.C.C.R. 17500, 17507 (2000) (“*NextWave Order on Reconsideration*”) (citing 47 U.S.C. § 309(j)(3)(A)).

*the development and deployment of new technologies and services* and to promote competition for the benefit of the public.”<sup>7</sup>

Despite the best efforts of the FCC and the Auction 35 applicants, the D.C. Circuit’s June 2001 decision finding that the FCC violated Section 525 of the Bankruptcy Code has made it impossible for the FCC to award the licenses to the Auction 35 winners.<sup>8</sup> This is exactly the situation Congress meant to avoid when it adopted the auction statute – licenses have not been issued, the rights to the spectrum are in legal limbo and, some six years since the initial auction, the public has yet to benefit from the spectrum. Even with a victory by the FCC before the Supreme Court, further litigation could delay final resolution of this matter until 2005 or later.<sup>9</sup>

Auctions are meant to speed service to the public – not to tie up capital for indefinite periods of time. Now that it is clear that the premise of promptly awarding licenses to bring expeditious service to the public has been undermined, it is no longer reasonable to maintain the auction results and their attendant liabilities or to continue to hold the remaining deposits. While the Commission refunded a portion of the down payments pursuant to an order released in March

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<sup>7</sup> *Public Notice*, “C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000,” 15 F.C.C.R. 17251, 17256-57 (WTB Sept. 6, 2000) (emphasis added).

<sup>8</sup> *See NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 155 (D.C. Cir. 2001) (concluding that “section 525 prevents the Commission, whatever its motive, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11”), *cert. granted*, 122 S. Ct. 1202 (2002). Upon issuance of the Court’s mandate, the FCC returned NextWave’s licenses to “active” status. *See Public Notice*, “Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave Personal Communications, Inc.,” 16 F.C.C.R. 15970 (WTB 2001).

<sup>9</sup> *See* Letter from Peter C. Cramton, Professor, University of Maryland *et al.* to Michael K. Powell, Chairman, FCC, at 2 (Aug. 16, 2002) (“Cramton Letter”); *see also Public Notice* at 5 (“We also recognize that should the Supreme Court rule in the government’s favor, there may nevertheless be unresolved issues over the licenses, that would prolong the litigation.”).

2002, it has retained an amount equal to three percent of the applicants' net winning bids.<sup>10</sup> The full amount should now be refunded. As many members of Congress recently noted, "[i]t has been 20 months since the January 2001 close of Auction 35, and yet the increasingly convoluted NextWave litigation has prevented the FCC from delivering spectrum licenses to the winning bidders. . . . In light of these circumstances, the FCC should permit carriers to opt-out of their Auction 35 obligations."<sup>11</sup>

**B. The Contingent Liability Attributed to Auction 35 Applicants Is Causing Substantial Economic Harm and Is Contrary to FCC Spectrum Policy**

The FCC continues to hold the applicants liable for the full amount of their winning bids "[s]hould the Commission prevail in its ongoing litigation with NextWave."<sup>12</sup> This significant contingent liability has adversely affected carriers' ability to attract capital to fund new and enhanced service offerings and to acquire needed spectrum in other auctions or the secondary market, creating a negative ripple effect on the wireless industry and the economy in the form of lost jobs and investments. Such a result is contrary to the FCC's spectrum management policy to foster efficient spectrum markets and put spectrum to its highest and best use, while ensuring that "its processes do not become a bottleneck in bringing new radio communications services and

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<sup>10</sup> See *Requests for Refunds of Down Payments Made in Auction No. 35*, Order, 17 F.C.C.R. 6283, 6291 (2002) ("*Partial Refund Order*"). The Commission retained three percent of the applicants' net winning bids because of its stated desire to "protect the integrity" of the auction process. *Id.* As one economist explains, however, "[b]y asserting that it owes no contractual obligation to deliver spectrum to winning bidders in a timely manner, the FCC increases uncertainty in the auction process and will cause future bidders to discount bids or avoid auctions altogether." J. Gregory Sidak, *The Economic Benefits of Permitting Winning Bidders to Opt Out of Auction 35*, Aug. 26, 2002, at 6, 37 ("*Sidak Report*"), available at <[http://www.criterioneconomics.com/articles/sidak\\_opt\\_out\\_report.pdf](http://www.criterioneconomics.com/articles/sidak_opt_out_report.pdf)>.

<sup>11</sup> See Letter from Representative Cliff Stearns *et al.* to Michael Powell, Chairman, FCC, at 1 (Oct. 4, 2002) ("*Stearns Letter*").

<sup>12</sup> See *Partial Refund Order*, 17 F.C.C.R. at 6283.

technologies to the public.”<sup>13</sup> It is also inconsistent with the goal of licensing PCS spectrum to “stimulate economic growth and create jobs for thousands of Americans.”<sup>14</sup>

The current and ongoing harms to the industry and the economy as a result of the Auction 35 liabilities include the following:

- **Credit crisis.** On June 21, 2002, the outlook for the entire wireless industry was downgraded to “negative” by Moody’s Investors Service, due in part to the approximately \$16 billion liability overhang applicable to Auction 35 applicants. Because Auction 35 licenses were never awarded, winning bidders in essence assumed significant liabilities without offsetting assets. As a result, the perceived risk of lending to these carriers is increased, leading to higher borrowing costs and less available credit.<sup>15</sup>
- **New investments curtailed.** Because of the contingent nature of the Auction 35 liabilities, it is nearly impossible for applicants to engage in prudent business planning and risk assessment. As a result, capital spending to build/upgrade facilities and towers, expand/enhance services, and purchase new equipment is retarded,<sup>16</sup> contrary to the FCC’s policy of ensuring that “its processes do not become a bottleneck in bringing new radio communications services and technologies to the public.”<sup>17</sup>

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<sup>13</sup> See *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, 14 F.C.C.R. 19868, 19868, 19870-71 (1999) (“*Spectrum Policy Statement*”).

<sup>14</sup> *Competitive Bidding Second Report*, 9 F.C.C.R. at 2349. In order to realize this goal, the Commission stated that any competitive bidding system used for PCS must “award licenses expeditiously.” *Id.*

<sup>15</sup> See Declaration of William F. Heitmann in Support of Verizon Wireless’ Motion to Amend Scheduling Order in *Cellco Partnership v. FCC*, Nos. 02-1110 & 02-1111, at 1-2 (D.C. Cir. filed June 24, 2002) (Heitmann Declaration) (citing Moody’s Investors Services, Press Release, June 21, 2002); Sidak Report at 3, 6, 14-15; see also Statement of Robert Konefal, Managing Director, Moody’s Investors Service, at the FCC *En Banc* Hearing on Steps Toward Recovery in the Telecommunications Industry, Oct. 7, 2002, at 3 (noting that “our outlook for the next 12 to 18 months for all segments [of the telecommunications sector] is negative”).

<sup>16</sup> See Sidak Report at 13-14, 16 (noting that “the increased cost of capital for some wireless carriers could squeeze out investment for the very services that may drive the industry’s growth”); Stearns Letter at 1 (“The \$16 billion contingent liability on the books of almost all the major carriers in the wireless industry is harming consumers, stifling investment, and slowing potential recovery of this important industry sector.”).

<sup>17</sup> See *Spectrum Policy Statement*, 14 F.C.C.R. at 19871.

- **Downstream business/job losses.** The decline in capital spending has had an adverse impact downstream on a number of businesses, including tower companies and equipment manufacturers, who are seeing a drop in business from their carrier clients. Small and midsize carriers are also impacted, because their equipment demands alone are insufficient to cause equipment vendors to produce low-cost devices. Together, this translates into lost revenues and jobs<sup>18</sup> – directly at odds with the goal of licensing PCS spectrum “to stimulate economic growth and create jobs.”<sup>19</sup>
- **Inefficient spectrum use.** Despite the critical need for additional spectrum to offer new and enhanced services, Auction 35 applicants are less likely to acquire spectrum at auction or in secondary markets given the uncertainty created by their substantial contingent liabilities and the precedent in this case binding auction winners indefinitely to spectrum they bargained for but may never receive.<sup>20</sup> The elimination of competitors from bidding on such spectrum prevents it from being put to its highest and most efficient use, contrary to the FCC’s spectrum management policy.<sup>21</sup>

Affording Auction 35 applicants relief, however, would have tremendous public interest benefits. According to a recent economic study:

Allowing bidders to opt out of Auction 35 would allow them to accelerate and redirect valuable capital into the wireless industry. Wireless carriers would invest in infrastructure to expand capacity on their current systems. This spending would directly benefit equipment manufacturers and create new jobs. The creation of new jobs in the wireless equipment industry would slow or reverse the trend of layoffs of the wireless equipment manufacturers. The wireless carriers would also invest in future spectrum auctions, because they require new spectrum to provide new services.<sup>22</sup>

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<sup>18</sup> See Sidak Report at 17-18.

<sup>19</sup> *Competitive Bidding Second Report*, 9 F.C.C.R. at 2349.

<sup>20</sup> See, e.g., Sidak Report at 4; Response of Salmon PCS, LLC to Motion to Amend Scheduling Order in *Cellco Partnership v. FCC*, Nos. 02-1110 & 02-1111, at 4 (D.C. Cir. filed July 5, 2002).

<sup>21</sup> See *Spectrum Policy Statement*, 14 F.C.C.R. at 19868.

<sup>22</sup> Sidak Report at 3-4.

The positive impact on the wireless sector by removing the Auction 35 liability overhang is echoed by Congress,<sup>23</sup> scholars,<sup>24</sup> the financial community,<sup>25</sup> and representatives of the wireless industry.<sup>26</sup> Indeed, Chairman Powell recently acknowledged the importance of removing “the debt that hangs over [the telecommunications] industry” as one step toward economic recovery.<sup>27</sup> The Commission should use its regulatory tools to “drive forward economic growth and productivity by altering the telecommunications regulatory landscape,”<sup>28</sup> and afford relief to Auction 35 applicants.

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<sup>23</sup> Both the House and the Senate have introduced legislation to alleviate the \$16 billion capital overhang from Auction 35 harming the wireless industry. *See* S. 2869, 107<sup>th</sup> Cong. (2002); H.R. 4738, 107<sup>th</sup> Cong. (2002). In addition, more than 43 lawmakers, including many sponsors of the pending House legislation, recently sent a letter to the FCC urging the Commission to relieve applicants of their liability. *See* Stearns Letter at 2 (noting the recent sharp decline in market value and job losses affecting the wireless industry, and stating that “[a]llowing opt-out can help reverse this decline, and stimulate job growth by freeing up \$16 billion in wireless industry capital.”)

<sup>24</sup> *See* Cramton Letter at 2.

<sup>25</sup> *See, e.g.,* Frank J. Governali *et al.*, *FCC Auction Decision Major Positive for Industry*, Global Equity Research, Goldman Sachs, Sept. 12, 2002; Thomas J. Lee *et al.*, *FCC Seeks Comments on Possible Cancel. of Auction 35*, US Equity Research, JP Morgan, Sept. 13, 2002; Steven R. Yanis *et al.*, *Press Reports FCC to Free Wireless Carriers of NextWave Obligation*, United States Equity Research, Banc of America Securities, Sept. 12, 2002; Susan A. Lynner *et al.*, *FCC Seeks Comment on Allowing Carriers in NextWave Reauction to “Opt Out” of Their Bids*, Equity Research, Prudential Financial, Sept. 12, 2002; Linda Mutschler *et al.*, *Relief for the NextWave Bidders?*, Global Securities Research & Economics Group, Merrill Lynch, Sept. 12, 2002.

<sup>26</sup> *See, e.g.,* Letter from Thomas E. Wheeler, Cellular Telecommunications & Internet Association, to Michael K. Powell, Chairman, FCC, at 1 (Aug. 13, 2002).

<sup>27</sup> *See* Remarks of Michael K. Powell, Chairman, FCC, at the Goldman Sachs Communicopia XI Conference, New York, NY, Oct. 2, 2002, at 2.

<sup>28</sup> *Id.* at 3.



**C. Penalties Are Not Warranted Because the Auction 35 Applicants Are Not in Default and Are in Compliance with the FCC's Rules**

Regardless of whether Auction 35 applicants request voluntary dismissal of all or certain of their long-pending applications, the Commission seeks comment on whether a bidder “should be barred from participating in [any future] reauction of the licenses or otherwise obtaining such licenses for a period of time.”<sup>29</sup> Such a penalty is not warranted because the Auction 35 applicants are not in default and have complied with the Commission’s auction regulations.

Section 1.2109(d) of the FCC’s rules states that “[b]idders *who are found to have violated the antitrust laws or the Commission’s rules* in connection with their participation in the competitive bidding process . . . may be prohibited from participating in future auctions.”<sup>30</sup> To Cingular’s knowledge, the Auction 35 applicants for spectrum licensed to NextWave and Urban Comm have complied with the FCC’s rules regarding upfront and down payments, and none is known to be in default. Accordingly, there is no basis to penalize such applicants by precluding them from participating in future spectrum auctions. Indeed, these applicants have already been penalized by the interest lost on the monies already paid into the FCC that cannot be recovered. Moreover, there are lost opportunity costs associated with those funds, not to mention the incremental impact on the industry’s balance sheets and overall financial health. Further penalizing bidders would also “have a negative financial impact on future auction revenues.”<sup>31</sup>

Auction 35 is a very different situation from that faced by the Commission when it adopted the *Restructuring Orders* in the late 1990s, where the FCC did impose such penalties.<sup>32</sup>

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<sup>29</sup> *Public Notice* at 4, 5.

<sup>30</sup> 47 C.F.R. § 1.2109(d) (emphasis added).

<sup>31</sup> Stearns Letter at 2.

<sup>32</sup> *See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Second Report* (continued on next page)

In that case, licensees had already received their licenses and would have been in default absent FCC intervention. Thus, the *Restructuring Orders* provided “relief to financially troubled licensees” who had sought “modification of their installment payment obligations” due to their inability to pay.<sup>33</sup> While those licensees received the licenses they bargained for, even though they were unable to make their installment payments, by contrast the current applicants have not received their licenses for the last two years despite having made timely upfront and down payments. Any attempt to draw an analogy to the precedent in the *Restructuring Orders* as a basis to penalize the Auction 35 applicants for requesting dismissal of their long-pending applications is misplaced.

### CONCLUSION

For the foregoing reasons, the Commission should afford Auction 35 applicants relief.

Respectfully submitted,

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*and Order*, 12 F.C.C.R. 16436 (1997), *recon.*, *Order on Reconsideration of the Second Report and Order*, 13 F.C.C.R. 8345 (1998), *further recon.*, *Second Order on Reconsideration of the Second Report and Order*, 14 F.C.C.R. 6571 (1999) (collectively, the “*Restructuring Orders*”).

<sup>33</sup> *E.g.*, *Order on Reconsideration of the Second Report and Order*, 13 F.C.C.R. at 8347.